

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1516 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

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YASHVANTRAY SHAMJIBHAI

Versus

DAMJIBHAI HERAJBHAI SHINGALA

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Appearance:

Mr.S.B.Vakil for MR BD KARIA for Petitioners  
MR SURESH M SHAH for Respondent No. 1

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CORAM : MR.JUSTICE D.C.SRIVASTAVA  
Date of decision: 14/08/98

J U D G E M E N T

1. This is tenant's revision under Section 29(2) of the Bombay Rent Act (though wrongly described in the revision petition as revision under Section 29(3) of the Bombay Rent Act).
2. Brief facts giving rise to this revision are as under :

Two shops number 11 and 12 were let out by the respondent to the defendants - revisionist 1 to 3 on monthly rent of Rs.250/- besides house tax, education cess and electric meter charges of Rs.1/- p.m. It was alleged by the respondent - plaintiff that the defendants 1 to 3 had illegally sub-let or transferred or assigned their interest in the suit shops to the defendant No.4 unlawfully. Arrears of rent was also claimed for 15 days which is immaterial because decree for eviction cannot be based on this ground. Thus, eviction was sought under Section 13(1)(e) of the Rent Act.

3. In their joint written statement the defendants No.1 to 3 contested the Suit denying illegal sub-tenancy or transfer or assignment of their interest in the Suit shop to the defendant No.4. They contended that the defendant No.1 is doing radio repairing work in the suit shop where defendant No.4 is working as their servant and the possession of the suit shop is with the defendants.

4. The defendant No.4 also contested the suit on identical ground alleging that he is servant of the defendants No.1 to 3 and is not their sub-tenant. He pleaded that he is unnecessary party in the suit and the suit is bad for mis-joinder of parties.

5. The trial Court framed general issue under Section 13(1)(e) of the Act incorporating all the three grounds for eviction contained in the said section. However, the finding of the trial Court on this issue was that the defendants No.1 to 3 have unlawfully transferred their interest in the suit shops to the defendant No.4. With this finding the suit for eviction of the defendants was decreed.

6. An Appeal was preferred by the defendants which was also dismissed. Hence this revision.

7. Learned Counsel for the respondent contended that on the question of sub-letting there is concurrent finding recorded by the two courts below on proper appreciation of evidence on record. Hence no interference in this revision is required. As to the scope of interference in revision the learned Counsel further contended that even if from the evidence on record two views are possible, the High Court in revision will be reluctant to substitute its own views. However, I find that the argument proceeds on the presumption that the two courts below have recorded concurrent finding on illegal sub-letting. On the other hand the finding of

the trial Court on Issue No.1 is that the defendants No.1 to 3 have unlawfully transferred their interest in the suit shops to the defendant No.4 and it is this finding which has been confirmed by the lower Appellate Court by observing that the trial Judge has rightly come to the conclusion that the defendants No.1 to 3 have transferred their interest in the suit shop to the defendant No.4 within the meaning of Section 13(1)(e) of the Bombay Rent Act.

8. It is thus clear from the two findings of the trial Court and the appellate Court that there is no finding on illegal sub-letting nor is there any finding on assignment of interest in the premises by the tenants defendants No.1 to 3.

9. So far as scope of interference in revision is concerned certainly the revisional court will not interfere in concluded findings of fact. However, if such conclusion is reached on mis-application of law, Section 29(2) of the Rent Act does not come in the way of the revisional court in correcting such erroneous conclusion.

10. The finding recorded by the two courts below is not a pure finding of fact; rather it is on a mixed question of law and fact. At first the finding of fact has to be seen and then it is to be tested whether such finding of fact has been correctly applied to the law contained under Section 13(1)(e) of the Act.

11. It is, therefore, desirable to consider the scope of Section 13(1)(e) of the Act.

12. Section 13(1)(e) of the Act provides that a landlord shall be entitled to recover possession of any premises if the Court is satisfied that the tenant has since coming into operation of this Act (unlawfully sublet) the whole or part of the premises or assigned or transferred in any other manner his interest therein.

13. A plain reading of this section shows that it is not confined to illegal sub-letting alone. Three situations are contemplated under this section. The first is that if it is a case of unlawful sub-letting of the whole or part of the premises by the tenant in chief to some one else then the landlord becomes entitled to decree for eviction of the tenant in chief.

The second situation contemplated by the Legislature in this section is that if it is established

that the tenant has assigned in any other manner his interest in the premises he is liable to be evicted.

The third situation is that in case the tenant is found to have transferred, in any other manner, his interest in the premises he becomes liable for eviction.

Since the legislature has used three different situations in this section the intention of the Legislature is to be gathered in similar manner.

14. Coming to the first ground, viz. unlawful sub-letting it may be mentioned that previously the word was "sub-let" but this was deleted and substituted by the words "Un-lawful subletting" by Bombay Act 49 of 1950 through Section 5(1) of the said Act. What is unlawful sub-letting is not defined under this Section. However, Section 15(1) of the Act can be taken into consideration for understanding what is the meaning of unlawful sub-letting.

15. Section 15(1) of the Act provides that notwithstanding anything contained in any law but subject to any contract to the contrary it shall not be lawful after coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein.

16. Thus, from Section 15(1) of the Act it is clear that every sub-letting is not per se illegal. If there is any contract to the contrary between landlord and the tenant and the sub-tenancy was created under that contract it will not be illegal. Likewise if sub-tenancy is created with the consent and permission of the landlord it will again not be illegal. The sub-tenancy will be illegal provided it was created after coming into operation of the Bombay Rent Act, 1947 and that too without knowledge and consent of the landlord.

17. Even some of illegal sub-lettings are protected under the proviso to Section 15(1) of the Act and also under Section 15(2) of the Act.

18. The proviso to Section 15(1) of the Act provides that the State Government may by notification in the official gazette permit in any area the transfer of interest in premises held under such leases or class of leases and to such extent as may be specified in the notification. Thus, under this proviso the State Government is empowered to issue notification in the

official Gazette permitting such sub-leases in a particular area as may be specified in the notification and in that event such sub-leases shall be valid.

19. Section 15(2) of the Act further provides that the bar against sub-letting, assigning or transferring the premises contained in Sub.Section 1 shall be deemed not to have had any effect before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959. But here also the requirement is that the sub-tenancy was created between 1947 to 21.5.1959 when this Ordinance was promulgated and in pursuance of such sub-tenancy the sub-tenant was in possession of the property and remained in possession on the date of promulgation of the Ordinance.

20. Consequently it is clear that every sub-tenancy is not unlawful. Unlawful tenancies have been explained in the forgoing portion of this judgment and it is only when such unlawful sub-tenancy is established that the tenant in chief can be evicted under Section 13(1)(e) of the Act.

21. For establishing illegal sub-letting the initial burden lies upon the landlord. The courts have from time to time laid down that the landlord is hardly aware of the terms of secret contract of sub-tenancy between the tenant in chief and the sub-tenant. The landlord is further ignorant whether the sub-tenant is paying any rent to the tenant in chief or not. Still inspite of these difficulties the landlord is not discharged of initial burden of proving illegal sub-tenancy. The question is how such onus is to be discharged by the landlord.

22. Keeping in view the above difficulties likely to be faced by the landlord in such cases the Courts have laid down two essential ingredients which are to be proved by the landlord. The first is that the tenant in chief had transferred exclusive possession either of the whole or a portion of the tenanted premises to the sub-tenant and the second is that such transfer of possession was for valuable consideration.

23. Transfer of exclusive possession implies that the sub-tenant has been put in effective control of the premises or part of the premises and the tenant in chief has withdrawn himself from the premises in question and has lost his control over such premises. The sub-tenant on the other hand has been put in possession exclusively without further reference to the tenant in chief. If the

tenant in chief on the other hand retains partial control over the premises it cannot be said that he has transferred exclusive possession of the premises to the sub-tenant. Different considerations weigh when the premises is let out for residential purpose and when it is let out for commercial purpose.

24. The landlord is said to have put the sub-tenant in exclusive possession either of whole or part of the tenanted accommodation where he looses his control over the whole or part of the tenanted accommodation in which sub tenant is put in possession. Likewise in accommodations which are let out for commercial purpose the tenant-in-chief is required to have put the sub-tenant in exclusive possession, not only of the premises, but there should also be some evidence to indicate that the articles meant for carrying on business in such commercial accommodation were either taken away by the tenant in chief or were handed over to the sub-tenant for valuable consideration. It is only when the tenant-in-chief looses effective control over the premises or looses his entire interest in the premises that it could be said that the sub-tenant was put in exclusive possession of the tenanted accommodation. The Courts while dealing with the case of sub-tenancy have to record specific finding that exclusive possession had been delivered. Such delivery of possession may either be admitted or established or proved by evidence or otherwise. It may be open to the Court to infer the nature of possession in the absence of any explanation from the tenant or the party in possession. The factum of possession requires to be established. It is only thereafter further question of inquiry or inference arises. The Courts have therefore to record specific finding based upon the evidence on record whether exclusive possession either of the whole or part of the tenanted accommodation has been handed over to the sub-tenant. If such finding is recorded in clear terms then the next question for consideration which arises is whether such transfer was for valuable consideration. If, however, there is no specific finding of the courts below regarding transfer of exclusive possession further inquiry regarding transfer for valuable consideration hardly arises.

25. So far as second ingredient is concerned it is very difficult for the landlord to establish by direct evidence that transfer of possession was for valuable consideration. The landlord can hardly be expected to be present when the rent is paid by the sub-tenant to the tenant in chief. Likewise it is difficult for the

landlord to summon and produce the rent receipt issued by the tenant in chief to the sub-tenant. In order to get over this difficulty it has been laid down that from the circumstances also the courts can infer that the transfer of possession was for valuable consideration. Such circumstances may depend upon the facts and circumstances of each case and no exhaustive test or formula can be laid down on this point. However, one or two instances may be given on this point also. For instance, if the tenant in chief transferred exclusive possession to a stranger it can be implied that such transfer to a stranger was for valuable consideration. Likewise transfer of exclusive possession to a relation of the tenant in chief may also in some cases give rise to inference that such transfer was for valuable consideration.

26. When these two conditions are fulfilled the tenant in chief can certainly be evicted on the first ground contemplated under Section 13(1)(e) of the Act, namely, illegal sub-letting.

27. The other two grounds are also there under this section. The second ground is that where the tenant has assigned in any other manner his interest in the premises and the third ground is that the tenant has transferred in any other manner his interest in the premises.

28. For these two grounds also transfer of possession is required to be established by the landlord. Unless it is a case of transfer of exclusive possession, may be by assignment or by transfer of interest in the premises, the decree for eviction on either of these two grounds cannot be passed. It would be contradiction in term to hold that the tenant in chief has assigned his interest in the premises, but is still in occupation thereof. So will be the case of transfer in any other manner of tenant's interest in the premises.

29. The interest of the tenant in the premises has to be viewed with two angles. The primary interest of the tenant in the premises is his tenancy right. Unless it is established that the tenancy rights were transferred or assigned by the tenant in chief to the sub-tenant a tenant in chief can not be evicted so also the sub-tenant. Assignment or transfer contemplates under this section, complete assignment or transfer of interest of the tenant. Partial assignment or partial transfer of tenant's interest in the premises is foreign to the scope of Section 13(1)(e) of the Act.

30. However, the words "in any other manner" in the subsequent portion of this section means that it is not necessary that such transfer or assignment must also be for valuable consideration. The words "in any other manner" indicate that such assignment or transfer may be for consideration, may not be for consideration or the same may be gratuitous or without consideration. Consequently when assignment or transfer in any other manner of interest of the tenant in the premises is tried to be established by the landlord he is not expected to establish that such assignment or transfer was for valuable consideration. But still the landlord has to establish that such assignment or transfer was complete and the alleged sub-tenant was put in exclusive possession of either of the whole or part of the premises.

31. With the above exposition of law as contained in Section 13(1)(e) of the Act it has to be seen whether the Judgments and Decrees of the two Courts below are in accordance with law or not.

32. The learned Counsel for the revisionist contended that neither the trial Court nor the Appellate Court has recorded any finding, rather specific finding, that the defendants No.1 to 3 have transferred their interest in the premises and put the sub-tenant in exclusive possession of the premises. He, therefore, contended that in the absence of finding on transfer of possession further inquiry regarding valuable consideration is not to be made and for this omission of the two courts below the judgments and decrees of the two courts below are rendered contrary to law. Hence interference in this revision is justified and the two judgments and decree are liable to be set aside.

33. I have carefully gone through the Judgments of the two courts below on the point of transfer of possession. The trial Court has given only this much finding on possession which is reproduced below :

"First of all in the suit before me the plaintiff has successfully proved that the defendant No.4 is attending the suit shop and that is also the case of the defendants. Of course the evidence of the defendant is that the defendant No.4 is their employee, but it is not believed in view of the train of reasoning which I have discussed hereinbefore."

This finding cannot be said by any stretch of imagination to be finding of the trial Court that exclusive possession of the suit shops has been



transferred by the defendants No.1 to 3 to the defendant No.4.

34. The lower Appellate Court has observed at one place in the Judgment that one thing is admitted fact that the defendant No.4 is admittedly found present in the suit shop. This observation does not amount to finding of the appellate Court that the defendant No.4 has been transferred exclusive possession of the two shops by the defendants No.1 to 3. Except this there is no categorical finding of the lower Appellate Court that the defendant Nos.1 to 3 have transferred exclusive possession of the two shops in suit to the defendant No.4. If this is so then in the absence of specific findings of the two courts below regarding transfer of exclusive possession to the defendant No.4 further inquiry whether such transfer was for valuable consideration or not is not needed. Further, the two courts below have not found it to be a case of illegal sub-letting. On the other hand they have found that it was a case of unlawful transfer of interest by the defendants No.1 to 3 to the defendant No.4. For recording this finding there is no cogent evidence on record. There is no direct evidence that the defendants No.1 to 3 have transferred their interest in the shop, viz. interest in the tenancy rights to the defendant No.4. There is no evidence that these defendants have transferred their interest in the radio manufacturing equipments kept in the shop to the defendant No.4. On the other hand it has come in evidence that the defendant No.2 is practising doctor at Junagadh while the defendant No.3 is out of country i.e. in U.S.A., and the defendant No.1 is doing business in Radio at Junagadh. It is also in evidence that at-least once in a month the defendant No.1 is coming and attending the suit shop. This evidence, therefore, shows that the defendant No.1 is retaining his interest in the disputed shop and has not completely transferred his interest in the disputed shop to the defendant No.4.

35. The lower Appellate Court has appreciated the evidence on wrong lines by wrongly placing onus of proof upon the defendants. No doubt the defendants case was that the defendant No.4 is their servant. The defendant No.4 is also related as brother-in-law of the defendant No.2. The initial burden lies on the landlord and once the landlord succeeded in discharging his initial burden then only the onus will shift on the tenants to explain in what manner the stranger or relation was attending the shop in dispute. Since in the case before me the landlord has failed to discharge the initial burden of

prooving complete transfer of interest of the defendants No.1 to 3 in the disputed shops, viz. tenancy right as well as interest in the articles and implements of repairs kept therein further inquiry is meaningless and no duty was cast upon the tenants to establish in what manner the defendant No.4 was sitting in the shop. However, some attempt was made by the defendants to explain that the defendant No.4 was sitting in the shop as servant. This attempt, according to the two courts below, was not successful which becomes finding of fact on which this court will be reluctant to interfere. However, the net result of the above discussion is that since there is no finding or a specific finding recorded by the two courts below that it was a case of complete transfer of interest in the tenancy as well as in the premises by the tenants in chief to the sub-tenant, the two courts below committed manifest error of law in applying the third condition for eviction of the tenants and sub-tenants mentioned under Section 13(1)(e) of the Act. Even if it is presumed or believed to be a case of transfer without consideration or valuable consideration even then the decree for eviction cannot be passed because the landlord has failed to establish that there was complete transfer of interest in the premises by the tenants to the alleged sub-tenant. The revisional interference is therefore justified. The Judgments and decrees of the two Courts below, to my mind, are contrary to law. The revision has therefore to be allowed. The error committed by the two Courts below has to be rectified accordingly.

36. In the result the Revision is allowed. The Judgments and Decrees of the two Courts below granting decree for eviction in favour of the respondents are hereby set aside. The Decree of arrears of rent and mesne profit in the shape of arrears of rent granted by the trial Court and also fixing the standard rent at Rs.250/- p.m. besides taxes is, however, maintained. In the facts and circumstances of the case the parties shall bear their own costs.

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